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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. [redacted] 68

WABASH RAILROAD COMPANY,
ILLINOIS CENTRAL RAILROAD COMPANY,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Appellants,

vs.

COMMERCIAL TRANSPORT, INC.,
UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Eastern District of Illinois.

BRIEF OPPOSING MOTIONS TO AFFIRM

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La Salle Street Press—Chicago 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 928

WABASH RAILROAD COMPANY,
ILLINOIS CENTRAL RAILROAD COMPANY,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

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BRIEF OPPOSING MOTIONS TO AFFIRM

Appellees are asking the Court to overturn *without opinion* an important, long-standing and consistently followed Commission construction of § 207 of the Interstate Commerce Act: That an applicant for motor carrier authority must prove that at least one shipper who controls

the selection of the carrier will use the proposed service.[1] Here no such shipper supported the application; instead all who appeared testified that they were entirely satisfied with the railroad service and would not use applicant's service if authorized. For that reason the Commission followed its long established rule and denied the application.

We submit that this Commission construction of § 207 should not be nullified by a summary affirmance of the judgment below but that the important question here involved should have the Court's consideration on full briefs and oral argument.

The District Court's judgment rests on a misapplication of *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957). That case does not even touch upon the Commission construction here involved, since there the shippers who controlled the selection of the carrier supported the application. The Court held that they were entitled to the advantages of the carrier of their choice. No question was present there of shipper support, only the question of service advantages. Obviously these are two separate elements of "public convenience and necessity" under § 207: support by shippers who control the selection of the carrier, and service advantages to such shippers. But a summary affirmance here would blur these two elements and bring confusion to the application of § 207. It would create the impression that testimony as to claimed service advantages makes it unnecessary to prove that any shipper will use the service, even, as here, in the face of the unanimous testimony of the shippers that they would not use the proposed service.

The Commission construction of the shipper support element of § 207 is entitled to explicit consideration. It should

[1] See footnotes 3 and 4, pp. 7-8, Statement as to Jurisdiction.

not be smothered under a summary affirmance of a misapplication of *Schaffer*. The respect due an administrative construction, *American Trucking Associations* v. *United States*, 344 U.S. 298, 310 (1953), and the dependence of the transportation industry upon clear cut rulings, *Frozen Food Express* v. *United States*, 351 U.S. 40, 44 (1956), calls for specific decision of the shipper support issue on which the Commission based its order.

In this case the Commission did not overlook the service advantage element of § 207; it listed the claimed advantages in its report (St. Jur. pp. 33-34). But it properly did not reach the service advantage issue since applicant failed to prove that even one shipper, who controlled the traffic wanted to employ such advantages. There was thus no need to make findings as to the claimed advantages. Compare *Southwestern Sugar and Molasses Co., Inc.* v. *River Terminals Corporation*, U.S. Sup. Ct., No. 155, June 22, 1959.

The Government's motion does not question the solidity of the line of ICC decisions referred to in footnote 1 above. Commercial's motion, p. 7, seems to imply that *Indianhead Truck Line, Inc., Extension—Cement, In Bulk*, 77 M.C.C. 187 (1958), is a break in this line, but such a contention is wholly erroneous. There the Commission was careful to point out that it was denying authority as to all origins lacking shipper support and was granting authority only where positive shipper support appeared. On this the Commission said, p. 193:

> "The crucial question to be determined in these proceedings, then, is the location of bulk motor-carrier loading facilities, for, as seen, certain opposing cement manufacturers do not want trucks in their yards or do not now have nor wish to install such facilities, and this is a decision within their managerial discretion.
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>
> "These companies are evidently not interested in

> loading motor vehicles; applicants have failed to show that these companies have the facilities to do so, and accordingly none of the applicants will be granted authority to serve these points, * * *."

The last sentence in the excerpt from the report quoted by Commercial, p. 7, referred *only* to shippers "in a position to select and control the means of transportation to be employed."

There is nothing odd about the cement producers' position in this case. Many shippers realize that if they are to retain for long the advantages of railroad service they must patronize the railroads and oppose extension of motor carrier service. See, for example, the resumé of the evidence presented by shippers in support of the railroads in the Commission's report in *Pacific Intermountain Express Co.—Control and Purchase—Keeshin Freight Lines*, 57 M.C.C. 341, 371, on reconsideration 472 (1950). In respect to the shipper evidence in that case the Commission said in part, p. 472:

> "The evidence presented by grain exchanges and by shippers of building materials, cement, coal, and various other commodities shows that they, too, are concerned about the diversion of higher-rated traffic from the rail lines. This evidence as well as the evidence presented by the protesting railroads is relevant and material and must be considered by us in arriving at the findings required by section 5 of the act."

After upsetting the Commission's long established shipper support principle, the District Court suggested an alternate ground for annulling the order: That the proposed service actually would be used if granted. In support of this point the Court stated that the railroads feared loss of traffic if the application were granted. The Government argues to the same effect. There is no merit in this contention.

Five railroad witnesses testified at the hearing, which lasted only one day (Reporter's Transcript 93, 105, 115, 129, 134, 140). Only the first testified in any respect as to the possible effect upon railroad traffic of the granting of the application, his testimony being that his railroad feared loss of traffic "if the application is granted" (Tr. 94). Two of the shippers testified before he did and the third immediately after him (Tr. 76, 83, 100).

At the time the first railroad witness testified he could not know whether there would be later shipper witnesses who would support some or all of the authority requested. The railroads were entitled to assume that the Commission would adhere to its shipper support principle, so the witness' fear of loss of traffic was based on the hypothesis that the application would be granted and rail traffic lost *only if there were shipper support for the application.* Thus the railroads' fear of loss "if the application is granted" meant "if as a result of shipper support the application is granted." The railroads did not know there would be no shipper support until all of the witnesses had completed their testimony and the applicant had failed to produce any rebuttal witnesses (Tr. 154). Since no shipper support developed, the hypothetical basis for fear of loss of traffic due to shipper support proved to be unfounded.

Thus there is no basis for saying that the railroads feared loss of traffic in the absence of shipper support for the application.

The legal presumption the District Court tried to invoke, that failure of two cement producers to appear proves they would use the proposed service (St. Jur. pp. 10-11), warrants no further discussion, except to say that it would become an established principle of law by granting the motions to affirm.

The motions should be denied and probable jurisdiction should be noted.

Respectfully submitted,

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